Supreme Court, U.S.
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No. 97-928

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

PAUL A. BILZERIAN,

Petitioner,

v.

HSSM #7 LIMITED PARTNERSHIP,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeal For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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STATUTES

11 U.S.C. § 523 passim

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that a writ of certiorari be denied with respect to the judgment below.

OPINION BELOW

The Respondent, HSSM #7 Limited Partnership ("HSSM") respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Eleventh Circuit's opinion in this case. That opinion is reported at 100 F.3d 886 (11th Cir. 1996).

STATEMENT OF FACTS

Petitioner Paul A. Bilzerian ("Bilzerian") accurately describes the Opinions Below, Jurisdiction and the Statute Involved. However, as set forth below, and pursuant to Rule 15 of the Supreme Court Rules, HSSM disagrees with the Statement of Facts set forth by Bilzerian. The Statement of Facts as presented by Bilzerian is largely inaccurate and immaterial to the questions presented. What is relevant to this

Petition are the proceedings below and the facts found in those proceedings.

A. The Proceedings Below.

This matter originally arose out of a judgment entered on April 2, 1991 by the United States District Court for the Northern District of Texas in HSSM #7 Limited Partnership v. Bilzerian and Bicoastal Financial Corporation, No. CA3-89-0963-R (N.D. Tex. 1991), aff'd, No. 92-1261 (5th Cir. March 9, 1993), in favor of HSSM and against Bilzerian and Bicoastal Financial Corporation ("BFC"), jointly and severally. The judgment awarded HSSM over $20 million in compensatory damages and $1,224,000 in punitive damages (the "Texas judgment") (the "Texas Case"). The Fifth Circuit affirmed the Texas judgment in a per curiam opinion dated March 9, 1993.

The Texas judgment was based on a finding that Bilzerian committed "actual fraud" when he induced HSSM to invest over $20 million in Suncoast Partners Limited Partnership ("Suncoast"), one of several interrelated, Bilzerian-controlled entities. Suncoast existed solely to be a limited partner in Bilzerian Partners Limited Partnership I ("BPLP-I"), a partnership established by Bilzerian that ultimately acquired The Singer Company ("Singer"), now known as Bicoastal Corporation. BFC, the other defendant in the Texas Case, is the general partner of Suncoast.

The record in the Texas Case, filed in toto in the United States Bankruptcy Court for the Middle District of Florida (the "Bankruptcy Court"), established that Bilzerian individually controlled, among other entities, Suncoast, BFC and BPLP-I. (BPLP-B, referred to in Bilzerian's Statement of Facts [Bilzerian Partners Limited Partnership Series B], was

essentially a predecessor to BPLP-I.) Bilzerian was, and is, the controlling principal and President of BFC (the general partner of Suncoast), and also owns all of its stock. Before his bankruptcy, Bilzerian individually was also a general partner of BPLP-I; the other general partner of BPLP-I, Bicoastal Acquisition Corporation ("BAC"), was an entity which, like BFC, had Bilzerian as its president and sole shareholder. BPLP-I was the sole owner of the common stock of Bicoastal Corporation (prior to confirmation of its plan of reorganization in its own Chapter 11 bankruptcy).[1/]

Following the entry of the Texas judgment, HSSM instituted post-judgment discovery, including a document request directed to discovery of Bilzerian's assets. After Bilzerian refused to respond, the Texas court entered an order requiring Bilzerian and BFC to produce all requested documents by August 5, 1991. Rather than comply with that order, on August 5, 1991, both Bilzerian and BFC filed voluntary Chapter 11 bankruptcy cases in the Bankruptcy Court. Following this Court's denial of certiorari in Bilzerian's related, criminal securities fraud case, Bilzerian's Chapter 11 case was converted to Chapter 7. Bilzerian v. United States, 502 U.S. 813 (1991). BFC's bankruptcy case was ultimately dismissed; and it has not satisfied the Texas judgment.

HSSM brought an adversary proceeding in the Bankruptcy Court to determine the dischargeability of the over $20 million judgment owed by Bilzerian individually to HSSM. It is this proceeding that led to the instant petition. HSSM filed a motion for summary judgment as to the Section

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1/ The BAC and BFC stock was actually owned either by Bilzerian, individually, or by Bilzerian and his wife as tenants by the entirety.

523(a)(2)(A) count, in which it asserted that, under the principle of collateral estoppel, the debt arising out of the final judgment in the Texas Case was nondischargeable "for obtaining money, property, services, or an extension, renewal or refinance of credit, by -- (A) false pretenses, a false representation, or actual fraud." Bilzerian also cross-moved for summary judgment on that count.

On November 1, 1993, the Bankruptcy Court entered an order which, in relevant part, denied HSSM's motion for summary judgment, granted Bilzerian's, and held the debt to be dischargeable under Section 523(a)(2)(A). The Bankruptcy Court based its ruling on a conclusion that Bilzerian himself must have obtained money or property from HSSM for Section 523 to apply.

HSSM appealed the Bankruptcy Court's order to the United States District Court for the Middle District of Florida (the "District Court"). In a Memorandum Opinion dated July 31, 1995, the District Court reversed, holding that the Bankruptcy Court had applied an incorrect legal construction of Section 523(a)(2)(A). The District Court adopted the so-called "receipt of benefits" analysis of Section 523(a)(2)(A), and, accordingly, held that a debtor need not "individually" receive the money obtained by fraud, but need only receive some benefit. Any other result would permit "the sophisticated debtor to circumvent § 523 by creating a 'corporate shell to receive the fruits of his or her misdeeds'." After determining that the Bankruptcy Court based its grant of summary judgment to Bilzerian on an erroneous conclusion of law, the District Court found that the Bankruptcy Court should have entered summary judgment in favor of HSSM because the Texas Court had already ruled upon the fraud issue and collateral estoppel prevented those matters from being re-litigated. The District

Court, therefore, reversed the Bankruptcy Court's order, and remanded the case with a direction that the Bankruptcy Court enter judgment in favor of HSSM.

On December 3, 1996, the United States Court of Appeal for the Eleventh Circuit affirmed the District Court and joined several other circuit courts in adopting the "receipt of benefits" analysis. The Court specifically "conclude[d] that Bilzerian received a benefit from his fraud."

B. The Facts Below.

Much of Bilzerian's Statement of Facts concerns his relationship and past dealings with Craig Hall (a principal of HSSM's corporate general partner), Bilzerian's perceptions of Hall's financial difficulties, and Bilzerian's purported success in dealing with notable investors in "highly publicized transactions." All of these facts are immaterial and irrelevant, and their recital does nothing more than rehash arguments that Bilzerian made and lost in the Texas Case. HSSM will not burden this Court by addressing the specifics of these alleged facts; however, HSSM's response should not be construed as agreement with, or acquiescence to, Bilzerian's version.

What is relevant to the questions presented is that in the Texas Case, HSSM alleged that Bilzerian made a series of misrepresentations to HSSM to induce it to invest $20,400,000 as a limited partner in Suncoast. In particular, HSSM alleged that Bilzerian (and BFC) obtained HSSM's investment in Suncoast and its entry into the Suncoast Limited Partnership Agreement by a series of falsehoods, which, among others, included misrepresentations as to Bilzerian's skill and expertise in legitimate securities transactions and his intentions regarding

a repurchase agreement (the "Put") contained in the Suncoast Agreement. The Complaint also alleged that Bilzerian made the misrepresentations as president of BFC and "for Bilzerian's own personal benefit as shareholder of [BFC]."

Bilzerian's misrepresentations to HSSM provided him with direct and discernable benefits. The record in the Texas Case established that in connection with the takeover of Singer, Bilzerian individually received a 25 percent "override" on any profit. Bilzerian testified at trial that the override "[represented] the amount of profit that I would receive, first in the event profits were realized in [BPLP-I]." The federal judge who tried the Texas Case, in his Findings and Conclusions, specifically found that Bilzerian personally had a 25% override on profits derived from the Suncoast partnership investment in BPLP-I. Thus, HSSM's investment in Suncoast, which enabled Bilzerian to purchase Singer, resulted in direct, individual financial benefit to Bilzerian, just as Bilzerian designed it to do. Moreover, once the takeover occurred, Bilzerian acknowledged that he received, at least as of the date of the Texas trial, a $1.25 million bonus from Bicoastal, in addition to salary.

C. The Texas Judgment and its Affirmance.

On July 30, 1990, the jury returned a unanimous special verdict in favor of HSSM and against Bilzerian and BFC, jointly and severally. On or about April 2, 1991, the court entered judgment on the verdict.

In the Texas judgment, the court refused either to award HSSM specific performance on its contract claim or to allow HSSM to elect between its remedies for its breach of contract claim or fraudulent inducement. Instead, the court adjudicated

Bilzerian "guilty of actual fraud," rescinded the Suncoast agreement for fraud in the inducement (effective upon the payment of the judgment amount), and ordered BFC and Bilzerian, jointly and severally, to pay HSSM over $20 million in compensatory damages and $1,224,000.00 in punitive damages.[2/]

On February 24, 1992, the district court filed Findings of Fact and Conclusions of Law. The district court specifically found that HSSM would not have invested in Suncoast without the Put contained in the Suncoast Agreement, and adopted all but one of the findings of the jury. The court refused to adopt the jury's answer to Question No. 5, in which the jury determined that a market value existed for HSSM's interest as of December 31, 1988. Bilzerian's Statement of Facts ignores the fact that this finding was not adopted.

On March 9, 1993, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Court Should Deny the Petition With Respect to the Dischargeability of Punitive Damages

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[2/] The April 2, 1991 judgment was amended by Order dated April 11, 1991, which corrected a clerical error in the calculation of the prejudgment interest. The Texas judgment is for $26,861,312.78 in compensatory damages and prejudgment interest, and $1,224,000.00 in punitive damages. Post-judgment interest accrues at the rate of 6.46%. By order dated February 24, 1992, the court awarded HSSM $20,006.75 in costs as well.

Bilzerian's initial basis for requesting this Court to grant his petition for certiorari was that a conflict existed between the circuit courts on the issue of whether punitive damages and prejudgment interest should be dischargeable under Section 523(a)(2)(A). This Court should note that the punitive damages aspect of this case was a minor point below; in fact, that portion of the award was less than 5% of the total amount. Indeed, the Eleventh Circuit's opinion does not even address this topic. As acknowledged in his Supplemental Petition, however, this Court has already granted a petition for certiorari in the case of Cohen v. De La Cruz, No. 96-1923. Consequently, because this Court already has this issue before it, the petition, as to that issue, should either be denied or held pending a decision in that matter.

II. The Court Should Deny the Petition With Respect to Whether a Creditor Must Prove Actual Loss and Whether a Debtor Must Have Actually Obtained Money from the Creditor

Bilzerian sets forth two other reasons for granting the petition. First, he suggests that the Eleventh Circuit's decision is inconsistent with Field v. Mans, 116 S. Ct. 437 (1995). Second, he contends that the Court should determine whether a creditor must prove that a debtor actually obtained some benefit in order to prevail under Section 523(a)(2)(A).

With respect to Field v. Mans, Bilzerian seizes on one phrase in the opinion -- the "general common law of torts" -- to attempt to discern an inconsistency with the Eleventh Circuit's opinion in this case. Field concerned the level of reliance a creditor must prove under Section 523(a)(2)(A). Nowhere in the opinion does the Court discuss the general common law of torts to determine what "loss" is required under Section 523.

Consequently, the perceived conflict with the "fundamental premise" of Field v. Mans is simply an invention. Furthermore, Bilzerian's position regarding loss is met by the Eleventh Circuit's statement that "Bilzerian's argument that HSSM did not sustain a loss is meritless in light of the money judgment entered in favor of HSSM in the Texas case."

With respect to requiring that a debtor "actually" obtain some benefit, Bilzerian bases his petition on an alleged conflict between the circuits as to whether the "receipt of benefits" is the appropriate analysis under Section 523(a)(2)(A).

However, the circuit courts are not split on this issue: rather, they are unified, and under these circumstances, no reason exists for granting the petition. In the opinion below, the Eleventh Circuit joined the majority of courts which regard a debt for obtaining money or property derived by fraud as nondischargeable as long as the debtor receives some benefit. Thus, for example, if a debtor fraudulently induces someone to invest in a corporate entity controlled or owned by the debtor, the debt is nondischargeable because the debtor necessarily benefits from the investment.

The Fifth, Ninth and Sixth Circuits, the only other circuit courts to have directly confronted this issue, have adopted the so-called "receipt of benefits" analysis. In In re Luce, 960 F.2d 1277 (5th Cir. 1992), the debtor, like Bilzerian, argued that her debt was dischargeable despite Section 523(a)(2)(A) because "she never actually obtained any money, property, services or credit for herself by fraud." Id. at 1283. The Fifth Circuit, however, held:

> The test under section 523(a)(2)(A), however, is not whether the debtor actually

> procured the money, property, services or credit for him or herself. [Citation omitted.] Rather, the Code dictates that a particular debt is nondischargeable "'[i]f the debtor benefits in some way' from the money, property, services or credit obtained through deception." Century First Nat'l Bank v. Holwerda (In re Holwerda), 29 B.R. 486, 489 (Bankr. M.D. Fla. 1983)(Paskay, J.) (holding that debtor who was a principal of a corporation "'obtained money' within the meaning of § 523(a)(2)" when the creditor approved a loan to the corporation).

Id. In Luce, although the funds obtained went to a partnership, the debtor -- as a partner -- obtained direct benefit.

Similarly, in In re Ashley, 903 F.2d 599, 604 (9th Cir. 1990), the plaintiffs loaned money to a corporation in which the debtor, an accountant, was not even an officer or director. Rather, the debtor merely helped obtain the loans as part of his "'business plan to gain a foothold in the machine shop industry'" with the owners of the corporation. The Ninth Circuit held that the debt was nondischargeable since the debtor's "link with AMM [the corporation] placed him in a position to benefit from any infusion of capital to that enterprise. Under these circumstances, inducing the [plaintiff] to invest in AMM was indeed obtaining something for himself." Id.

Also, in In re Ledford, 970 F.2d 1556 (6th Cir. 1992), cert. denied, 507 U.S. 916 (1993), the Sixth Circuit held that the fraud of one partner should be imputed to a second partner (who had no knowledge of the fraud), rendering the debt of the

second partner non-dischargeable. The funds there were used for partnership purposes and financed a condominium project from which the second partner would profit.

The conclusions reached by the Fifth, Sixth, Ninth and Eleventh Circuits have been almost universally accepted by bankruptcy and district courts in a wide variety of factual situations.[3/] Indeed, prior to the stark change in view expressed

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[3/] See, e.g., In re Naimo, 175 B.R. 878, 880-81 (Bankr. E.D. Pa. 1994), aff'd, 1995 WL 163598 (E.D. Pa.) (criticizing Bankruptcy Court in this case and holding that no language states the debtor must personally obtain property; rather the word "obtained" relates to the fact the property must be obtained from the debtor); In re Mones, 169 B.R. 246, 251 (Bankr. D.D.C. 1994) ("Requiring that the debtor obtain money for himself limits the meaning of the term 'obtain' when no such limitation is expressly or implicitly found in the provision's language); In re Colodner, 147 B.R. 90 (Bankr. S.D.N.Y. 1992) (claim for nondischargeability stated where fees for patent services obtained through misrepresentations went not to debtor but to his wholly owned corporation); In re O'Connor, 145 B.R. 883 (Bankr. W.D. Mich. 1992) (where debtor was the sole shareholder and president of corporation which obtained lease, debt arising from lease was nondischargeable because debtor's future income depended on profitability of corporation); In re Dunstan, 117 B.R. 632, 637 (Bankr. D. Col. 1990), modified on other grounds, 146 B.R. 269 (D. Col. 1992) ("To meet the requirements of [§ 523(a)(2)] the debtor needs to receive some benefit from the property, but not necessarily the property itself"); In re Kudla, 105 B.R. 985, 989 (Bankr. D. Col 1989) (same); In re Delano, 50 B.R. 613, 617 (Bankr. D. Mass. 1985) ("It is well-settled that whether the

(continued...)

in Bilzerian's bankruptcy case, the Bankruptcy Court in this case, like these other courts, had repeatedly relied upon the receipt of benefits analysis. See, e.g., In re Holwerda, 29 B.R. 486, 489 (Bankr. M.D. Fla. 1983); In re Langworthy, 121 B.R. 903, 907 (Bankr. M.D. Fla. 1990) (Paskay, J.); In re Jones, 176 B.R. 629, 635 (Bankr. M.D. Fla. 1995); In re Rubenstein, 101 B.R. 769, 772 (Bankr. M.D. Fla. 1989); In re Vermont, 98 B.R. 581, 584 (Bankr. M.D. Fla. 1989) (Paskay, J.); In re Benson, 36 B.R. 537, 538 (Bankr. M.D. Fla. 1983) (Paskay, J.); In re Fallon, 29 B.R. 491, 494 (Bankr. M.D. Fla. 1983) (Paskay, J.).

Moreover, from a statutory construction perceptive, it is noteworthy that the statute nowhere indicates that the debtor alone must receive the fruits of the fraudulent conduct. Of equal importance, such a requirement makes no sense as a matter of public policy. Why should the more sophisticated

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[3/](...continued)
debtor is an officer and shareholder of a corporation and he uses a false financial statement to induce a creditor to extend credit to the corporation, the individual debtor is considered to have obtained money within the meaning of § 523(a)(2)(B)"); In re Mann, 40 B.R. 496, 499 (Bankr. D. Mass. 1984) (same); In re Sobel, 37 B.R. 780 (Bankr. E.D.N.Y. 1984) ("It is of no consequence that the money ostensibly went to Sobel, Inc. rather than to the [debtors] personally. Nothing is more commonplace than for the owners of a small closely-held corporation, like Sobel, Inc., to engage in fraud for the benefit of the corporation rather than for themselves directly. That a corporation is the beneficiary does not make the fraud any less"); In re Winfree, 34 B.R. 879, 882 (Bankr. M.D. Tenn. 1983) (finding that the debtor has received a benefit when a loan is made to a corporation of which he is a shareholder, officer and director).

offender -- Bilzerian being the quintessential example -- be rewarded for creating an entity into which he receives the money or property, while the "average" debtor, lacking the sophistication or resources necessary to create such a structure, is not? See, e.g., In re Cunningham, 163 B.R. 657 (Bankr. D. Mass. 1994) (loan received by joint venture conferred benefit on debtor who was part of joint venture); In re Arm, 175 B.R. 349, 353 (9th Cir. BAP 1994), aff'd, 87 F.3d 1046 (9th Cir. 1996) (benefit to debtor through entity that was affiliated with borrower sufficed for §523(a)(2)).

Finally, however described by the Bankruptcy Court for the Western District of Michigan in In re Pauley, 205 B.R. 501 (Bankr. W.D. Mich. 1997) (and that court does not even suggest a split), the Sixth Circuit's opinion in In re Brady, 101 F.3d 1165 (6th Cir. 1996) is consistent with this case. There, the court specifically followed the Ninth Circuit's ruling in In re Ashley, 903 F.2d at 599, to hold that where the creditor invested in a company of which the debtor was president he had directly or indirectly obtained a benefit.

As a subsidiary point, Bilzerian suggests that he must have received an "actual" benefit. He ignores the fact that this is precisely what the Eleventh Circuit found happened: the Eleventh Circuit specifically found that Bilzerian did receive a benefit. Although Bilzerian characterizes this benefit as "contingent" and "indirect", the findings by the Eleventh Circuit are otherwise. Indeed, despite Bilzerian's contention, the undisputed record establishes that, as found by the Texas Court, Bilzerian controlled Suncoast (as the principal and owner of Bicoastal Financial Corporation, its general partner), and also, as a general partner, controlled Bilzerian Partners Limited Partnership I ("BPLP-I"), the company in which Suncoast was a limited partner. Furthermore, not only does the

intimate relationship between Suncoast and Bilzerian necessarily create a benefit, the record below and the Findings of Fact and Conclusions of Law in the Texas Case establish that Bilzerian himself intended to profit handsomely from HSSM's investment in Suncoast through the 25% override on profits. Bilzerian also received a substantial salary and bonus once the takeover occurred. Furthermore, the fraudulent misrepresentation regarding the Put, which required Bilzerian to pay HSSM for its interest in Suncoast, directly benefitted Bilzerian because Bilzerian intended not to pay HSSM on his individual obligation when called to do so. Cf., In re Galbreath, 112 B.R. 892, 900 n.10 (Bankr. S.D. Ohio 1990) (release of personal liability on loan is benefit). Finally, Bilzerian's dominant and controlling role in Suncoast, BFC and BPLP-I is alone sufficient to establish that he benefitted from HSSM's investment in Suncoast. See In re Ledford, 970 F.2d 1556, 1561 (6th Cir. 1992), cert. denied 507 U.S. 916 (1993).

Bilzerian repeatedly indicates that the "benefit" was merely "potential" because of the Chapter 11 case of The Bicoastal Corporation f/k/a The Singer Company filed after his orchestrated takeover. While the merits of that statement are doubtful given that the investment helped provide the necessary capital to acquire The Singer Company (not to mention the receipt of the $1.25 million bonus), the policy behind such a view is equally dubious. Because there is no dispute that Bilzerian had a 25% override on the Suncoast profits from its investment in BPLP-1, Bilzerian basically argues that because he did not ultimately receive all of the fruits of his fraud (or at least some of those fruits), Section 523(a)(2)(A) should not apply. A dishonest debtor's failure to succeed in a fraudulent endeavor hardly seems a valid basis for reward: the creditor's loss, and the debtor's dishonest course of conduct, remain the same regardless. Indeed, in In re Ledford, 970 F.2d at 1556, it

appears that the project from which the debtor would profit was a failure; nonetheless, the debt was nondischargeable.

CONCLUSION

As set forth above, aside from the punitive damage question, the other questions presented need no resolution by this Court. The circuits are not split; the Eleventh Circuit's opinion is consistent with this Court's precedent; and the facts support the decision. For these reasons, the petition for certiorari should be denied.

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